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IN THE

Supreme Court of the United States

Cause No. A - 812

HARRY GRAHAM AND ELLEN GRAHAM

Petitioners

v.

STATE OF INDIANA

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

LINLEY E. PEARSON
Attorney General of Indiana

JOSEPH N. STEVENSON
Deputy Attorney General

Office of Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 232-6222

Attorneys for Respondent

Central Publishing Company, Inc., Indianapolis, IN 46206

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Respondent, the State of Indiana, respectfully prays this Court to deny the issuance of a writ of certiorari to the Supreme Court of Indiana, thereby refusing to review the decision entered by that court in Cause No. 2-984 A 274.

OPINION BELOW

The denial of Petition for Transfer may be found at Page 1 of Petitioners' "Appendix to Writ of Certiorari to the United States Supreme Court." That denial had the effect of letting stand the earlier decision and opinion of the Court of Appeals of Indiana which is reported at 480 N.E.2d 981, and may be found at page 8 of Petitioners' Appendix.

STATEMENT OF THE ISSUES

In the manner frequently encountered in *pro se* pleadings, the issues involved in this Petition are sometimes poorly or vaguely defined. Upon analysis of the written argument, it is sometimes seen that in argument Petitioners are actually developing a different issue or legal principle than would be suggested by their list of "Questions Presented" or their discussion headings.

The State would therefore respectfully propose to take the liberty of restating the issues presented in a manner which as fairly and concisely as possible defines the issues raised:

(pp. 20-27 of Petition)

I. Whether Indiana's medical licensing statute is unconstitutionally vague.

II. (pp. 27-29) Whether there was insufficient probable cause to issue a search warrant for Petitioners' business premises.

III. Whether the Indiana appellate courts improperly decided that an issue presented on appeal had been waived due to presentation of a basis for objection at the appellate level that was different from that raised at trial.

IV. Whether certain evidence was improperly admitted, against a contention that it was irrelevant or prejudicial.

V. Whether certain instructions were erroneously given against objections that they incorrectly stated Indiana law.

VI. Whether it was error to refuse a request for an instruction concerning the nurses' licensing statute.

VII. Whether the Indiana medical licensing statute unduly restricts the constitutionally-guaranteed right to free exercise of religion.

VIII. Whether the judgment in this case operated as an unconstitutional bar on a right of Sybil Bennett's to pursue her desired form of health care.

IX. Whether trial and verdicts on both the manslaughter and homicide counts constituted double jeopardy.

X. Whether there was error inherent in the failure to perform an autopsy on Sybil Bennett.

STATEMENT OF THE CASE

Petitioners Harry and Ellen Graham are husband and wife. They were both charged with involuntary manslaughter (Indiana Code 35-42-1-4), reckless homicide (Indiana Code 35-42-1-5), and unlawful practice of medicine (Indiana Code 25-22.5-8-1). Guilty verdicts were returned on all counts. The trial court entered judgments of conviction on the counts of reckless homicide and unlawful practice of medicine, "merging" the involuntary manslaughter verdict with that of reckless homicide.

The victim in this case was Sybil Bennett. She and Mr. and Mrs. Graham were all members of the Seventh Day Adventist Church.

Neither of the Grahams had a license to practice medicine. Ellen was, however, licensed as a registered nurse.

The Grahams professed to be followers of Ellen G. White, who is esteemed as a prophet by the Adventists. Sister White advocated the use of herbs and other natural substances to assist God in healing the sick. Many of her writings promote the internal and external application of pure water. She discredited the use of drugs. However, the evidence is that the Seventh Day Adventist Church does not encourage its members to reject medical care.

The Grahams operated an establishment called "Hoosier Health House", which catered primarily to those seeking a

naturopathic form of health care. The Grahams also sold vitamins, minerals, health food and equipment for processing health food. The Hoosier Health House also offered numerous publications and pamphlets advocating "natural" cures to various diseases, including cancer.

Sybil Bennett was in her fifties. She had been consulting a physician named Dr. VanNess. A lump appeared in Sybil's breast. Sybil's husband thought Dr. VanNess was looking after it.

However, Sybil went to the Hoosier Health House on June 2, 1983, complaining of a pain behind her eyes, a chronic cough, and physical weakness. It is not clear that the Grahams then had any knowledge about the breast lump, which by that time or soon afterward progressed to an open lesion.

After a preliminary examination, which included urine and saliva tests, Harry devised a program to treat Sybil's ailments. This program included nutritional supplements, fomentations (*i.e.*, a hot or cold compress applied to the skin to stimulate circulation), enemas, and colonic irrigations (the last is similar to an enema, but involves use of water under pressure introduced into the colon). On some days, the Grahams gave Sybil as many as eleven enemas employing coffee, carrot juice, aloe vera, castor oil, or pure water. Sybil would usually spend all day with the Grahams, with her husband dropping her off before work and picking her up in the afternoon. Frequently, she stayed overnight at the Grahams'.

The Grahams billed Sybil for these services in an amount totalling at least $7,000.00.

Sometime after Sybil started this regime at the Hoosier Health House, she showed the Grahams the open lesion on her breast. Sybil's husband thinks this happened in the second or third week Sybil went to the Grahams. Ellen Graham immediately recognized that Ellen was potentially suffering from breast cancer.

At Harry Graham's suggestion, Sybil requested him to set up an appointment with a Dr. Goldberg of Dayton, Ohio. Dr. Goldberg was an osteopathic physician, licensed in Ohio but not in Indiana. After conducting a biopsy, Goldberg concluded that Sybil was in fact suffering from breast cancer.

The Grahams and Mr. and Mrs. Bennett discussed the situation. The Grahams told Mr. Bennett that they were going to treat the lesion on Sybil's breast and that they thought they could cure it. The Grahams told Bennett that Dr. Goldberg could get the substance known as "Laetrile", which some contend has some efficacy in treating cancer but others contend is unproven. Goldberg in fact prescribed Laetrile and instructed Ellen to administer injection of it. In addition to giving the injections (in Indiana), the Grahams continued to give Sybil nutritional supplements, enemas, and colonic irrigations.

During this time, Bennett pleaded with his wife almost daily to go to a medical doctor, which Sybil refused to do. Bennett also frequently talked to Harry Graham about getting other advice or help because Sybil wasn't getting any better. During this period of time, on several occasions when Bennett made his pleas for Sybil to accept conventional treatment, Ellen told Sybil that "they [conventional physicians] would just cut you up."

In late July, the Grahams recommended that Sybil get all her teeth pulled because they were bad and they said the teeth had to be removed to effect a complete cure because there was a lot of poison going into her body. This extraction required three trips to South Bend, Indiana, about a hundred miles each way from the Delaware County location of the Hoosier Health House, where the dentist recommended for the purpose by the Grahams was located.

Sybil's physical condition continued to decline. Jack Bennett contacted a physician, Dr. Suer, about examining her. Dr. Suer said he could treat Sybil if she would come in without being forced.

On the same day, August 19, 1986, Jack Bennett took a friend of Sybil's, Gail Heiland, to visit Sybil at the Grahams, where Sybil was now staying several days at a time. Ms. Heiland described the place as not clean, but not filthy. She noted the posters on the walls promoting certain views on health, particularly one showing a man without fingers, intimating that if people took medical drugs they would lose their fingers. During this time, Sybil was given audio tapes to listen to, such as tapes on colonics, tapes about how the narrator had purportedly cured herself of cancer with colonics and enemas, and tapes of religious songs.

On August 24, 1983, Harry Graham called Jack Bennett and said Jack had better get Sybil. Bennett, his sister, and Gail Heiland got her. Sybil was then very weak, she could hardly walk, and her breathing was very shallow. They took her directly to Dr. Suer's office. Sybil was so weak that she could not make it into the office, so the doctor examined her in the back seat of the car. He immediately had her placed in Ball Memorial Hospital in Muncie. He observed that she was in respiratory distress and slipping in and out of consciousness.

At the hospital, she was placed on a respirator immediately. Initially, she was treated for heart failure, lung cancer, sepsis, and the breast cancer, which was then found to have metastatized to the lung. Sybil also suffered from lack of oxygen in her blood, pulmonary edema, and an eletrolyte imbalance. Dr. Suer felt that the heart failure might have resulted from toxic levels of potassium contained in Sybil's system. As part of the nutritional program devised by the Grahams, the Grahams had administered potassium.

Soon, Sybil's breathing improved greatly. It became clear to the physicians that her entire problem was due to the metastatized cancer. The only reasonable hope she had was chemotherapy. But by the time she reached the hospital, she was too weak to withstand chemotherapy.

Without the option of chemotherapy, the physicians were forced to let the disease run its course. She was doomed before she came to the hospital. Dr. Suer attempted to interview Graham concerning the treatment she had received at the "Hoosier Health House." It was difficult to get information from Graham, Suer said. Graham gave Dr. Suer some information about Sybil's "treatment", but he withheld any mention of the use of Laetrile. If Dr. Suer had known about the Laetrile (which happens to contain amounts of cyanide), it might have made a difference in the physician's diagnosis: they would have entertained the possibility of Laetrile intoxication.

About three weeks after being admitted to the hospital, Sybil Bennett died, on September 11, 1983. The immediate cause of death was respiratory failure. There was no need of an autopsy to determine the reason: the underlying cause of death was the breast cancer which had metastatized to the lung.

Testimony by Dr. Suer was that the Grahams did nothing to actually aggravate the cancer. But several enemas or colonics each day could weaken a person, because the colon contains many basic fluids and electrolytes. However, the use of potassium pills probably did have a harmful effect because the potassium level was so high when Sybil was admitted to the hospital that it was in fact toxic, and was part of what was wrong with her heart rhythm. Furthermore, the Grahams had an impact on the cancer in delaying Sybil's getting to chemotherapy, said Dr. Suer.

Dr. Suer also testified that there was no medical treatment or nutritive value to an enema or colonic, aside from the limited purpose of unclogging impacted fecal matter. (Enemas can be used for diagnostic purposes, such as barium enemas, and for cleaning the bowel for examination.)

The medical testimony was also that if Sybil had been strong enough to tolerate the chemotherapy, she would

have had an 80% chance of living longer, even with the stage of cancer that afflicted her. According to statistics, with chemotherapy she would have had a 36% chance of remission lasting a full five years, and an 80% chance of surviving for 17 months.

SUMMARY OF THE ARGUMENT

I. Indiana's Medical Licensing statute is not unconstitutionally broad since its terms are sufficiently precise to give a person of average intelligence due notice to conform his conduct to its requirements.

II. The search warrant was proper since there was sufficient evidence to show the magistrate the reliability of the information establishing probable cause for its issue.

III. & IV. The Indiana court decided the contended issue on the basis argued by Appellants. Petitioners have construed a preliminary discussion of a legal term of art ("variance" as it relates to difference between the crime charged and the facts proven) with the conclusion on the issue of admissibility of evidence. There is no showing that the evidence was prejudicial, and it was relevant. The elapsing of time between the offense and the collecting of this evidence affected only its weight and credibility, not its admissibility. Petitioners do not set out a federal claim on these issues.

V. Petitioners claim only that the Indiana courts interpreted contrary to their own prior opinions, thus not raising a federal question. In fact, the decision was in accordance with Indiana precedent.

VI. No federal question is alleged in this objection that Petitioners were entitled to a particular instruction; furthermore, the evidence established the defense intended by the instruction was not available.

VII. & VIII. Petitioners did not raise First Amendment "exercise of religion" issues in the Indiana appellate courts.

and these issues should not be determined at this stage, since they were not "pressed or passed upon" below.

IX. The trial court issued judgment and imposed punishment on either Pettioner only on one of the homicide counts, thus "merging" the other verdict. Since Petitioners were not subject to multiple punishment for the same offense, no Double Jeopardy violation occurred.

X. Petitioners allege no federal question connected with the lack of an autopsy on deceased, and did not press their issue below. The factual situation does not show prejudice as a result of lack of this evidence, nor is any specific prejudice advanced.

ARGUMENT

I.

THE STATUTE DEFINING UNLAWFUL PRACTICE OF MEDICINE IS NOT UNCONSTITUTIONAL

Appellants were convicted of unlawful practice of medicine, Indiana Code 25-22.5-8-1:

> "It is unlawful for any person to practice medicine or osteopathic medicine in this state without holding a license or permit to do so, as provided in this article."

The term "practice of medicine" is defined as follows in Indiana Code 25-22.5-1-1.1(a):

> "(1) Holding oneself out to the public as being engaged in the diagnosis, treatment, correction or prevention of any disease, ailment, defect, injury, infirmity, deformity, pain or other condition of human beings, or the suggestion, recommendation or prescription or administration of any form of treatment, without limitation, or the performing of any kind of surgical operation upon a human being, including tattooing, or the penetration of the skin or body orifice by any means, for the intended palliation,

relief, cure or prevention of any physical, mental or functional ailment or defect of any person;

(2) The maintenance of an office or place of business for the reception, examination or treatment of persons suffering from disease, ailment, defect, injury, infirmity, deformity, pain or other conditions of body or mind; or

(3) Attaching the designation 'doctor of medicine,' 'M.D.,' 'doctor of osteopathy,'; 'D.O.,' 'osteopathic medical physician,' 'physician,' 'surgeon,' or 'physician and surgeon,' either alone or in connection with other words, or any other words or abbreviations to his name, indicating or inducing others to believe that the person is engaged in the practice of medicine or osteopathic medicine as herein defined."

The Appellants present their claim for relief in this section of argument on the premise that the Indiana appellate courts erroneously decided a new question of law. Formally speaking, they seem to be using legal phraseology more properly invoked in petitions for the Indiana Supreme Court to transfer cases decided by the lower appellate court in the State. However, it is clear from context that they are actually presenting a challenge based on a Fifth Amendment Due Process contention that the cited statute is vague.

Due process requires that statutes prohibiting certain conduct be clearly defined. A statute using terms "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process of law." *Grayned v. City of Rockford*, 408 U.S. 104 at 108, 97 S.Ct. 2294 at 2298, 33 L.Ed.2d 222 at 227 (1972); *Baggett v. Bullitt*, 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 337 (1974).

However, Appellants themselves provide examples from the trial record of a witness, a registered nurse, testifying as to conduct which she understands from the statute is prohibited to her, absent a physician's orders. In addition, they

hypothesize several types of conduct which they assert would violate the statute and which they believe it would be illogical to consider violations. They seem to conclude that because such conduct should not be (in their view) subject to criminal liability the statute is vague. This is not a valid test for vagueness. The test is whether the statute adequately informs people of ordinary intelligence what conduct is proscribed. *Grayned, supra.*

The cited statute in fact gives detailed guidance as to what is considered the practice of medicine. In essence, it prohibits, among other things, operating a place for the business of examining and treating people suffering from ailments, diseases, etc; holding oneself out to the public as being engaged in the diagnosis and treatment of ailments, diseases, etc; and penetrating the skin or bodily orifice for the intended palliation, relief, cure, or prevention of ailments or defects. (The Indiana Court of Appeals has held that the clause beginning "...for the intended palliation, relief, cure, or prevention..." modifies only the verb phrase "...penetration of the skin or body orifice..." *State ex rel Medical Licensing Board v. Brady*, Ind. App., 492 N.E.2d 34, at 37 *et seq* (1986).

Petitioners omit to mention that the same statute also further defines some of the terms used in the sub-section defining "practice of medicine." Indiana Code 25-22.5-1-1.1(c) provides in relevant part that: "'Diagnose or diagnosis' means to examine a patient, parts of a patient's body, substances taken or removed from patient's body, or materials produced by a patient's body to determine the source or nature of a disease or other physical or mental condition..." It provides in Indiana Code 25-22.5-1-1.1(f) that "'prescribe or prescription' means to direct, order or designate the use of or manner of using, a drug or medicine or treatment, by spoken or written words or other means."

This further definition shows that some of Petitioners' illustrations are ill-taken. Contending that tobacco use

causes cancer is not "diagnosis" by any reading of the statute. Nutrition and such activities associated with nutrition as feeding, or the suggesting that certain foods or diets are, in general, healthful are not included in the definition of "prescribe or prescription", which as written and as understood by persons of ordinary intelligence means to direct a particular person's course of treatment pursuant to his individual examination. Health food proprietors thus are not prevented from extolling the virtues and qualities of their stock, although they might be prevented from recommending use of a particular product or group of products as a cure for an individual customer's health complaints, or holding out their wares as a substitute for medically-recognized treatment. Massage, so long as it does not purport to have a purpose to treat disease, is not included in that statute. (Early in the history of medical licensing in Indiana, after enactment of the State's first statute to this purpose in 1897, the State Attorney General issued an opinion to this effect. Opinion of the Attorney General of Indiana 1899-1900, p. 107.)

Under a predecessor statute very similar in its provisions to the current law (Ind. Stat. Ann 63-1311, Burns 1951), the Supreme Court of Indiana held that the purpose of the statute was "to protect people afflicted with diseases or illness in any degree from their own credulity." *Dean v. State ex rel Board of Medical Registration and Examination*, 233 Ind. 25, 116 N.E.2d 503 (1954).

A person of ordinary intelligence can readily ascertain that the legislature intended to proscribe any unlicensed person conducting himself as a healer (through physical means; healing through prayer is not affected) curer, or preventer of medical or functional ailments, if that person diagnoses through examination, or prescribes drugs or medicines, or performs surgery, or operates a business-place for examination or treatment, or engages in forms of cure, prevention, or relief by any means which involves invasion of the body through the skin or a body orifice. The

harm intended to be prevented by this statute is clear. It is not the layman's occasional removal of a splinter, or advising a friend to get food or rest. The danger is that a person unqualified to do so will promote himself into a position of unjustified trust such that other people will follow his bad advice or submit to an unwise or unskilled course of physical treatment.

Most persons who have had a splinter might allow a lay person to remove it with a needle (as long as his hand was steady and he did not pierce too deeply) and allowing this to happen is not likely to do harm. But few would allow a person to remove, say, an appendix unless convinced that he had knowledge and skill to do so. Likewise, most persons can take for what it's worth a well-meaning lay friend's suggestion that what is needed is carrot juice, or a vegetarian diet, or lots of Vitamin C for a cold. But where a person presents himself as some sort of knowledgeable health professional and prompts the taking of a certain drug or certain diet, or conducts certain invasive treatment, and puts this forward as a cure for a specific illness, a sufferer has less critical defenses. His ability to rationally consider the treatment is overborn by the clothing of expertise the unlicensed practitioner has donned. This is particularly true when the "treatment" proposed seems to offer a way to avoid more unpleasant (but medically sound) treatment.

If the statute is read as statutes should be, considered as a whole in light of its purpose and with the terms used therein given their ordinary and usual meanings, it provides clear guidance. Petitioners have not established that it does not give adequate definitions of the prohibited acts such as to allow a reasonably intelligent person to conform to its requirements. They have, accordingly, not demonstrated any entitlement to relief.

(The Grahams conclude this section of argument with an observation concerning potassium levels and inferences to be drawn therefrom which is not directed to the basic

contention of the argument. Respondents will address all cognizeable issues concerning sufficiency of the evidence in the appropriate argument section.)

II.

THE SEARCH WARRANT IN THIS CASE WAS NOT IMPROPERLY OBTAINED

Here Petitioners quarrel with the judgment of the State courts that probable cause was made out to support issuance of a search warrant whereby officers visited their "Hoosier Health House" and obtained physical evidence.

A magistrate's determination of probable cause to issue a search warrant should be given great deference by reviewing courts. The traditional standard for review of an issuing magistrate's probable-cause determination has been that so long as the magistrate had a "substantial basis" for concluding that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more. *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed 2d 527 (1983), which reaffirmed that "traditional rule." The task of the issuing magistrate is to make a practical, common-sense determination whether, given all the circumstances put before it, including the "veracity" and "basis of knowledge" of the persons attesting to the situation, there is a fair probability that evidence of a crime will be found in a particular place. And the duty of the reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . concluding" that probable cause existed. *Gates, supra*, 462 U.S. at 238, 103 S.Ct. at 2332.

Here, these requirements were clearly met. The persons providing the information upon which the warrants were requested were the deceased's husband, Jack Bennett, and the friend, Gail Heiland, who had been present at the "Hoosier Health House" premises, who had been to those premises and seen some of the conduct which was being investigated. They were not paid informants, but coopera-

tive citizens relating possibly criminal conduct which they had witnessed. They were speaking from first-hand knowledge. The issuing magistrate was in a position to assess their knowledge and veracity. The circumstances meet the practical traditional test of establishment of a substantial basis to conclude that probable cause existed. Thus, there is no showing of any constitutional violation in in issuance of the search warrant.

III. and IV.

IT WAS NOT IMPROPER TO HOLD THAT AN APPELLATE CONTENTION CONCERNING THE INTRODUCTION OF CERTAIN EVIDENCE WAS WAIVED BY USE OF A DIFFERENT BASIS FOR OBJECTION AT APPEAL THAN THE BASIS MAINTAINED AT TRIAL

In this instance, Petitioners are disputing the admission of pictures taken inside their "Hoosier Health House" over a month after Sybil Bennett was last treated there. They frame this issue in terms of what they call the Indiana appellate courts' refusal to consider this issue. This section of the State's response addresses both sections III and IV of their argument section.

The State would contend that the Grahams misunderstood the nature of the Indiana Court of Appeals discussion of the issue. They seem to believe that that court merely evaded the actual issue, and note that the appellate opinion used the term "variance" to cover the substance of a trial objection.

The term "variance" here is used to denote a difference between the facts charged and the proof adduced at trial. At trial, the objection was that the evidence was irrelevant.

The Court of Appeals did not evade discussion of the actual contention. It merely pointed out that no contention of a "variance" as understood by the usage above was made at any stage. "They complain, rather, that in addition to the

evidence admitted which directly supported the charge against them, evidence of acts not specifically alleged in the information was improperly introduced." 480 N.E.2d at 992.

The appellate court thus did no more here than properly identify the nature of the objection as an irrelevancy objection rather than a contention of variance. The court concluded that the Appellants did not set out the existence of a variance between the crime charged and the actions proven at trial, then addressed the contentions of irrelevance on the merits. It discussed why certain evidence was, in fact, relevant. 480 N.E.2d 981.

Then it moved to a discussion of the introduction of the pictures and testimony tending to show the appearance of the Hoosier Health House in late September, 1983, which is the only evidentiary matter discussed in this section of Petitioner's arguments. This the Court of Appeals termed "a second contention which is closely related to the issue of variance." 480 N.E.2d at 992-993. "The evidence challenged here includes the evidence which the Grahams contended was at variance with the charges ... [,] the definition of quackery ..., [and] testimony and photographic evidence which depicted the condition of the Hoosier Health House on September 30, 1983, more than one month after Sybil last received treatment at the Grahams' establishment. They assert on appeal that this evidence was irrelevant and unduly prejudicial." *Ibid.*

Thus, the Grahams are in error in their Petition for Certiorari when they contend that the Indiana Courts merely brushed off their appellant argument on a technicality based on counsel's framing the issues in terms of variance. In fact, one group of this evidence was assessed in terms of the trial objection that they were irrelevant, immaterial, or unduly prejudicial, in spite of counsel's use of the term "variance." The other group was held to have been objected to on appeal as irrelevant and unduly prejudicial.

The appellate court did not discuss their relevance, not because of a technical difference in basis of objection, but because whether they were relevant or not and hence properly admitted or not, no demonstration of prejudice was made.

Thus, far from being dismissed on a technicality, the Appellants' contentions of error in connection with the admission of this evidence was considered and discussed on the merits. *See* 480 N.E.2d at 993.

The question considered was the essential component of any error, whether any prejudice or harm was demonstrated. The Court of Appeals concluded that "[the Grahams] merely assert that the allegedly erroneous admission of this evidence substantially prejudiced their rights ... The Grahams have failed to make any coherent argument which specifically explains how these alleged errors resulted in significant prejudice. Therefore, we must conclude that any error which might have occurred as a result of the admission does not warrant reversal." *Ibid.*

The instant action is maintained under 28 U.S.C. §1257, which describes the certiorari jurisdiction of this Court, allowing review by writ of certiorari where there is a claim "under the Constitution, treaties, or statutes of ... the United States." Neither here nor in their appellate court briefs did Petitioners set up any federal claim. In fact, they repeat the same situation which was confronted by the Indiana courts, by failing to establish or even assert the existence of any particular prejudice. It is a common sense requirement that courts must at least be told the nature of the harm which befell a petitioner before they can act to redress such harm. To successfully invoke the certiorari jurisdiction (or, in a less restrictive analysis, to successfully overcome the prudential restriction made by this Court in certiorari cases) of this Court, such an allegation of harm must also show the federal claim involved. A petitioner must also show that the federal question was presented to the lower court. *Illinois v. Gates, supra.* In addition to not

alleging any particular prejudice, they made no federal claim at all in these argument sections. They make nothing more than a bald contention that the evidence involved was "blatantly prejudicial."

They have had many opportunities to advance the alleged prejudicial nature of admission of this evidence, and have refrained from doing so. It can fairly be concluded that there is no articulable prejudice involved, let alone any sort of prejudice which violated any federal entitlement.

Indiana law allows evidence of other criminal activity that may be admissible to prove, among other things, knowledge, intent, or a common scheme or plan from which the accused originated the charged plan. *Woods v. State*, Ind., 471 N.E.2d 691 (1984). As to the evidence about the appearance of the Grahams' place on September 30, any objection that time had passed between the last presence of Sybil Bennett there and the gathering of the pictures or descriptions might go to the weight of the evidence, but as this evidence still tended to prove or disprove some issue of fact, they were relevant and admissible under Indiana law. *Armstrong v. State*, Ind., 429 N.E.2d 647 (1984). There is no dispute that the scheme or plan to operate the "Hoosier Health House" in much the same manner as it was operated when Sybil Bennett was there continued to the time the descriptive evidence was gathered. Federal law has allowed admission of evidence concerning an ongoing operation for a much longer period of time than this. *United States v. Stump*, 735 F.2d. 273 *cert. denied*, ____ U.S. ____, 105 S.Ct. 203, 83 L.Ed.2d 134 (1984).

In summary, the evidence complained of in the Petition was not irrelevant, and was not imporerly admitted; the appellate courts did not dispose of the issues presented in connection therewith in any improper manner, no prejudice was alleged or shown, and no federal right whatever is implicated or contended to be implicated in this issue.

For this multiplicty of reasons, then, no entitlement is shown for relief in Issues III or IV of the instant Petition.

V.

NO BASIS FOR RELIEF IS SHOWN ON THE BASIS OF THE INSTRUCTIONS GIVEN BY THE TRIAL COURT

Petitioners ground their argument no. 5 on the contention that the trial court's instructions, and the Indiana appellate court's declining to grant relief because of the content of the instructions, constituted an erroneous decision of a new question of Indiana law. Their contention here is, patently, therefore a contention of a state question, and not a federal question at all. There is not even the baldest assertion that the decision was erroneous on some federal standard. Since no federal question is presented, the Petition should be denied. *Illinois v. Gates, supra*; 28 U.S.C. Sec. 1257.

The actual contention made here is that Indiana law required an instruction that in order to show homicide the state must show that the defendants "inflicted or caused to be inflicted an injury upon the victim which was a direct and proximate cause of death." All of their authority, both in their state court brief and presently, that that was an exclusive and required statement under Indiana, derives from instructions approved in cases in which the facts involved infliction of an injury. Thus, it was appropriate for the courts to discuss their cases in such terms, and the evidence supported instructions drawn in such terms.

Here, however, the facts were otherwise. The Indiana Court of Appeals in its decision on this case cited several cases and four volumes of legal scholarship to support the instruction that was actually given. This citation shows that under Indiana law the trial court's instruction on this issue was proper: in order to sustain its burden in homicide prosecutions of establishing causation, the State need only show that the defendants' conduct contributed mediately or immediately to the death of another person. *Powell v. State*, Ind., 437 N.E.2d 969 at 971 (1982).

Thus, there is not even a colorable claim that the Indiana courts in this case altered Indiana law or decided new law, let alone that they did so erroneously.

VI.

THERE IS NO BASIS FOR RELIEF SHOWN IN THE DENIAL OF A TENDERED INSTRUCTION

Here the Grahams repeat a contention that they were entitled to have the jury instructed concerning the provisions of the Nurses' licensing statute. They defended their actions on the basis that Ellen Graham was a licensed registered nurse, and that Harry was operating pursuant to her instructions.

Again, they make no federal claim, and thus the Petition is subject to denial either on the basis of failure of jurisdiction or for failing to meet this Court's prudential requirement that a federal basis exist that was "pressed and passed upon below." *Illinois v. Gates, supra.*

In addition, their own argument practically concedes the lack of merit of this contention. It says that Ellen raised the contention that "some of her conduct — if not all — was part of a nursing regimen." (page 37)

The Indiana Court of Appeals decided the issue on the basis that persons are not entitled to an instruction that is not applicable to or supported by facts in the record. *McDonald v. State*, 264 Ind. 477, 346 N.E.2d 569 (1975). As the Court of Appeals pointed out, the Grahams were not charged with unlicensed practice of nursing, and were not entitled to an instruction on that statute in the context of defining the offense charged. On the merits of a possible defense from the charge of unlicensed practice of medicine based on a contention that certain of their acts constituted nursing, the Court of Appeals noted that there was no evidence presented that a licensed nurse could, without authorization by a physician licensed in Indiana, inject Laetrile (or any other drug or purported drug) or perform

enemas or colonic irrigations. The Court of Appeals did note that Ellen presented evidence that nurses were authorized, and it was common nursing practice, to perform "fomentations." But this was only part of the conduct charged. There is no basis on which to claim that they were entitled by the nursing statute to diagnose Sybil's condition (either the heart condition she initially approached them for or the "ulcer" that developed that turned out to be breast cancer) or to prescribe and execute the course of treatment involving many and varied sorts of enemas and colonic irrigations, or the injections. (The State did not base its case on the identity of the substance used, Laetrile.)

Since there was no defense, not even a weak and inconsistent one, that could be postulated on the nursing statute, then pursuant to *Harrington v. State*, Ind. App., 413 N.E.2d 622, *trans. denied* (1980), the Grahams were not entitled to an instruction on that basis under Indiana law.

VII. and VIII.

THERE IS NO ISSUE OF VIOLATION OF FIRST AMENDMENT RELIGIOUS RIGHTS

In these two argument sections, the Grahams assert their adherence to a religious faith concerning health and healing stated by a founder of the Seventh Day Adventist Church named Ellen G. White. In fact, they claim a purer adherence to this faith than many leaders and medical doctors who are members of the church. The State would not presume to gainsay their faith or to assert that they are bound to limit the application of this faith to the extent these church leaders are said to allow them to limit it.

If this issue were to be addressed on its merits, though, the State would be constrained to point out that the Grahams are not talking about their right to order their own health treatment according to their view of Sister White's writings. They instead assert Sybil Bennett's un-

doubted right to exercise her religious beliefs. However, this is a personal right, and they cite nothing to establish that they are entitled to assert it on behalf of a third person, or that it conferred any rights upon them. They also transform their assertion of personal right to religious belief into an unfounded claim that their religious faith gives them a privilege to perform *upon others* acts constituting the practice of medicine.

However, the issue cannot be addressed on the merits. It was not even raised on appeal to the Indiana Court of Appeals, and was not considered by that Court in its opinion.

As noted above, the so-called "not pressed or passed upon below" rule has recently been reaffirmed by this court in *Illinois v. Gates, supra*. As *Gates* restated, due regard for the appropriate relationship of this Court to state courts demands that those courts be given an opportunity to consider the constitutionality of the actions of state officials. 462 U.S. at 221, 103 S.Ct. at 2323. The Petitioners have not pressed this claim of infringement of religious rights, nor, consequently, have the courts of Indiana passed upon it. Therefore, the court should decline to consider relief on this basis.

IX.

THERE WAS NO DOUBLE JEOPARDY VIOLATION

Petitioners complain because they were each tried on two counts of homicide for Sybil Bennett's death. This, again, is an issue that was not "pressed or passed upon" in the Indiana appellate court system. Therefore, pursuant to *Illinois v. Gates, supra*, it should not be considered by this Court.

Actually, Petitioners' claim here simply represents a lack of understanding of the application of the Double Jeopardy Rule.

The Double Jeopardy Clause of the Fifth Amendment, which is applicable to the States through the Fourteenth Amendment, prohibits three things: reprosecution for the same offense after an acquittal, reprosecution for the same offense after a conviction, and multiple punishment for the same offense. *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969); *North Carolina v. Pierce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed. 2d 656 (1969). This rule does not prevent prosecution on multiple duplicative counts at the same trial where the trial court imposes judgment so as to avoid cumulative punishment for the same offense. The rule of *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct., 75 L.Ed. 306 (1932) is that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one [for double jeopardy purposes], is whether each provision requires proof of an additional fact which the other does not." 284 U.S. at 304, 52 S.Ct. at 182.

In cases where the offenses proven at trial do not pass the *Blockburger* test and therefore a defendant cannot be subjected to separate punishment for them, it is proper to withhold judgment on the lesser offense, and punish only for the greater offense. This process in Indiana has become known by the term "merger", although historically this term had a somewhat different meaning. *Elmore v. State*, Ind., 382 N.E.2d 893 (1978).

In this case, the trial court concluded that the offenses of Reckless Homicide and Involuntary Manslaughter were identical, and did not enter judgment or impose punishment for Involuntary Manslaughter. Thus, the Grahams stand punished only for Reckless Homicide, notwithstanding the fact that the jury returned a verdict also for involuntary manslaughter. Since they are not subjected to multiple punishment for the same offense, the provisions of the Double Jeopardy Clause have not been violated.

X.

THERE IS NO ERROR IN FAILING TO PERFORM AN AUTOPSY

The State of Indiana can find no issue raised at the Indiana appellate courts relating to the fact that an autopsy was not performed on the deceased. Hence, insofar as it can even be said that a coherent issue is raised in the Petitioners' short paragraph, it should not be considered because not "pressed and passed upon" in the state courts. *Illinois v. Gates, supra.*

The reason Petitioners' argument cannot be said to raise a coherent issue is that it is nothing more than a trio of rhetorical questions: why did the Coroner not perform an autopsy (Obviously, the State responds because there was no doubt she died of the cancer which had metastatized to her lung), and was that not a breach of his duty (No, because the death was not unexplained), and wasn't that a violation of Petitioners' rights? (But Petitioners are silent as to what rights they think are involved.) If anything, absence of post-morten evidence, which in circumstances of this case might have included autopsy photographs showing the cancer, weakened the State's case, if it had any effect on either party's case.

In Indiana, reckless homicide in Indiana is a general intent crime which involves choosing a course of action either with knowledge of the serious danger to others involved therein, or with knowledge of facts which would disclose the danger to any reasonable man. *Salrin v. State*, Ind. App., 419 N.E.2d 1351 (1981). Reckless homicide can result from an act or omission that causally results in death, where such conduct or omission was voluntary, and the conduct and the conduct or omission was reckless and not merely negligent: that is, where it was both a conscious disregard of the harm that might result, and a substantial deviation from "acceptable standards" of conduct. *Slusher v. State*, Ind. App., 437 N.E.2d 97 (1982).

Here, there was no doubt of the cause of Sybil Bennett's death, and an autopsy would have cast no significant new light upon it. Petitioners' main contentions at trial and on appeal were that there was a lack of the necessary causal connection, and that their conduct was not reckless. There is no suggestion, now or in prior stages of this litigation, as to how the Coroner's decision not to conduct an autopsy unduly prejudiced Petitioners' ability to present this defense.

Indiana's courts have painstakingly excluded the possibility of homicide conviction for death through mere negligent omission, but have allowed homicide prosecutions where breach of a legally imposed duty rising to the level defined in *Slusher, supra*, has resulted in death.

Indiana's statutes impose upon all unlicensed persons the duty to refrain from practicing medicine. As argued elsewhere, one of the reasons this duty is imposed is to prevent persons from inducing an afflicted and thus vulnerable sufferer from pain or serious illness, from placing trust in someone unqualified to give treatment.

The State maintained in the Indiana courts, and presented evidence, that the Petitioners performed acts constituting the Unlawful Practice of Medicine, and that they knew some weeks before they ceased "treating" Sybil Bennett that she suffered from cancer with a prominent visible lesion, progressive weakening, increasing loss of sight in one eye, and what they themselves "diagnosed" as "cardiac arrest" (but which seems from properly admitted evidence to have arguably been the result of an easily remedied potassium imbalance). The Grahams, in their instant brief, point to some evidence which they believe disputes this conclusion, but the choice among contradictory evidence, if contradictory the evidence be in the case, was up to the factfinder at the trial level.)

Nevertheless, they not only "treated" her but prevailed upon her to avoid conventional medical treatment. There is

evidence that they immersed her in tape-recorded purported testimonials about "cancer cures" through colonics, that they displayed frightening posters about the evils of standard medical treatment, and that they directly played on her fears by advising her that regular physicians would just "cut her up."

To some degree, this conduct of Petitioners' seems to have been of commercial motivation. The "Hoosier Health House" was their businessplace, and the evidence was that they charged Sybil at least $7,000.00 for the treatments she received over a two and a half month period in their establishment.

There was evidence that medical chemotherapy treatment of Sybil Bennett would likely have resulted in her living much longer than she did, with a good chance of a full five-year remission of the cancer. By failing to obey their legal duty to avoid Unlicensed Practice of Medicine, Petitioners actively prompted Sybil to delay any recognized effective medical treatment.

Furthermore, there is uncontradicted evidence that the incredible number of enemas and colonics the Petitioners administered drained the body of fluids needed to maintain proper chemical and electrolytic balances. The result of this, as testimony showed, was that Sybil was weakened to the extent that chemotherapy was never available to her once she did come under licensed physicians' care.

There is not even speculation as to how the performing of an autopsy to confirm the clearly-understood cause of death could conceivably impact upon any of this evidence.

Petitioners have not presented any cognizeable issue connected with the lack of an autopsy in this record.

CONCLUSION

WHEREFORE, Respondent respectfully submits that the issues alleged by Petitioners have been correctly disposed of in conformity with the opinions of this Court and that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

LINLEY E. PEARSON
Attorney General of Indiana

JOSEPH N. STEVENSON
Deputy Attorney General

Attorneys for Respondent